

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-266

LOGAN CECIL

APPELLANT

VS. FINAL ORDER
SUSTAINING HEARING OFFICER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

TRANSPORTATION CABINET
MIKE HANCOCK, APPOINTING AUTHORITY

APPELLEE

** ** *

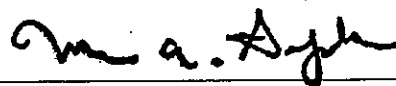
The Board at its regular June 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 15, 2014, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be, and they hereby are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **DISMISSED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 18th day of June, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. William Fogle
Logan Cecil
Kathy Marshall

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-266

LOGAN CECIL

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VS.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
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This matter came on for evidentiary hearing on March 24, 2014, at approximately 9:40 a.m. at 28 Fountain Place, Frankfort, Kentucky, before John C. Ryan, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A.

Appellant, Logan Cecil, was present and was not represented by legal counsel. The Agency, Transportation Cabinet, was also present and was represented by the Hon. William Fogle.

The matter was the subject of one pre-hearing conference conducted on January 22, 2014, at which the issue or issues were defined.

BACKGROUND

1. For a brief time, through October 21, 2013, Logan Cecil held the position of Highway Equipment Operator I in the Transportation Cabinet, Department of Highways, assigned to District 2. He was a probationary employee without status. By letter of that date over the signature of Tresa Straw of the Agency, he was terminated for lack of good behavior, specifically having tested positive for marijuana. A copy of the notice to him is attached as "**Recommended Order Attachment A.**" Mr. Cecil challenged this action under the appropriate category of "Dismissal" by appeal filed before this Board on November 17, 2013 and therein wrote in support of his case:

I am appealing the decision of my dismissal from my position as a Highway Operator I with the Transportation Cabinet, Department of Highway, District Two effective 10/21/2013 due to 'Lack of Good Behavior.' On 10-16-13 a urine specimen was collected by Multicare in Madisonville & tested positive for marijuana. I know the offense is in violation of General Conduct but this was an isolated event and in no way represents the person I am or the employee that I would be & request to be reconsidered.

2. Upon convening the evidentiary hearing, Appellant readily acknowledged that "I know I messed up," but pleaded for leniency in the resolution of his circumstance. He noted that some coworkers and possibly one or more supervisors urged him to seek whether some measure might be available to aid in retaining his job and thus this appeal. The Agency, in its preliminary remarks, noted that it has little choice in matters of this nature in light of its absolute charge towards the safety of the traveling public and its workers, and a positive drug test under current policy affords it no flexibility but to terminate the employee.

3. Commensurate with standing policy as to burden of proof, the Agency offered the testimony of **Kathy Marshall**, who has held the position of Human Resources Manager within the Agency for ten years. Among her duties is the administration and resolution of personnel, drug and alcohol matters. She ratified that Appellant was hired as a Heavy Equipment Operator I on October 16, 2013 and rather promptly thereafter administered a pre-employment drug screen. The Agency routinely utilizes an independent entity for this purpose. She confirmed that Appellant was positive for use of marijuana. She presented a copy of the report reflecting the results.

4. Ms. Marshall continued that, in keeping with announced and well publicized policy, Appellant was promptly terminated. She pointed to the Agency's Drug and Alcohol Testing Handbook for CDL Employees, confirming that at the time of his tentative employment Appellant was provided with this material and signed for it as understood. She noted that under federal regulations, the Agency has no flexibility in the matter, as referenced in the material. She recalled that within the last year a total of six personnel tested positive, of whom three were dismissed and three voluntarily resigned. The handbook was introduced as part of her testimony.

5. Under brief cross-examination, Appellant posed whether he might be permitted to take one or another class or course to redeem himself. The witness deferred to the provisions set forth in the handbook and also noted that the recommendation in the dismissal letter to obtain treatment should be followed and certified to enable Appellant in his future endeavors. She expressly deferred as to whether Appellant might ever be reemployed by the Agency.

6. The Agency having completed its proof, Appellant, **Logan Cecil**, offered brief testimony. He confirmed that he worked approximately one week at the Highway Garage in Hancock County, Kentucky, mostly straightening the shop, sweeping, and cleaning up trucks. He does not hold a CDL, his intent being to commence the position, become established, and ultimately submit to the requisite test. He acknowledged that he received and read the handbook and understood its contents. He further ratified that he has no defense to either the administration of the drug screen or the results thereof.

7. Following brief closing remarks, the matter stood submitted for a recommended order.

8. Appellant was in service with the Agency for less than two weeks and therefore probationary and without status. He was nonetheless subject to the provisions of 101 KAR 1:345, which is the regulation requiring good behavior, including compliance with all Agency policies and directives. Among these are the provisions of the Drug and Alcohol Testing Handbook, which abundantly reflects a “zero tolerance” for the presence of drugs or alcohol presented in random testing.

FINDINGS OF FACT

1. Appellant was hired by the Agency at District 2 into the position of Heavy Equipment Operator I on or about October 16, 2013. As part of its routine hiring procedure, he was administered a pre-employment drug screen by an independent agency engaged by the Agency for that purpose. This drug screen revealed positive evidence of marijuana use. Appellant was startled to learn of this, but acknowledges that he has no defense to the presence thereof. He further confirmed that he received and signed for the literature setting forth a “zero tolerance” policy and has no defense to the enforcement of the policy.

2. The Hearing Officer finds the testimony of the Agency witness and of Appellant to be credible.

CONCLUSIONS OF LAW

1. Both the sequence of events developed by testimony and the law and policy applicable thereto are crystal clear. At the time Appellant acquired his anticipated position, he was, or should have been, well aware of the conditions of employment. These included random drug screening to which he submitted and failed. He does not challenge this.

2. The Agency is under a statutory and/or regulatory mandate designed for the utmost safety of the traveling public and its employees, and no flexibility is afforded in matters of possible impairment of personnel designated to operate its equipment. Likewise, how the employee came to be impaired must be of little or no consequence when balanced against risk.

3. The actions of the Agency were neither excessive nor erroneous in light of the overall circumstances.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **LOGAN CECIL VS. TRANSPORTATION CABINET (APPEAL NO. 2013-266)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

ISSUED at the direction of **Hearing Officer John C. Ryan** this 15th day of May, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof mailed to:

Hon. William Fogle
Logan Cecil
Kathy Marshall



TRANSPORTATION CABINET

Frankfort, Kentucky 40622
www.transportation.ky.gov/

Steven L. Beshear
Governor

Michael W. Hancock, P.E.
Secretary

October 21, 2013

Logan M. Cecil

Re: Dismissal

Personnel Number: 288546

Dear Mr. Cecil:

This letter serves as notification that you are officially dismissed from your position as a Highway Equipment Operator I with the Transportation Cabinet, Department of Highways, District Two, effective close of business October 21, 2013.

In accordance with KRS 18A.095 and 101 KAR 1:345, you are notified that cause exists for your dismissal based on the following specific reason:

Lack of Good Behavior: On October 16, 2013, a urine specimen was collected by Multicare Workhealth in Madisonville, Kentucky, in conjunction with the Transportation Cabinet's Drug/Alcohol Testing Program for Commercial Driver License (CDL) holders and in compliance with the Federal Highway Administration Regulations. The result of your drug test was positive for marijuana.

The above offense is in violation of Personnel Board Regulation 101 KAR 1:345, Section I, General Provision; General Administration and Personnel Policy, GAP 801, General Conduct; Transportation Cabinet Drug and Alcohol Testing Policy and procedures as set forth in the Drug and Alcohol Testing Handbook for CDL Employees; Federal Regulations 49 CFR Part 40 and Part 382; and the Drug Free Workplace Policy.

The Federal Highway Regulations require the Cabinet to refer employees who test positive for drugs or alcohol to a Substance Abuse Professional (SAP) for evaluation counseling and/or treatment. The purpose of this referral is to ensure

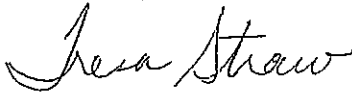
Logan M. Cecil
October 21, 2013
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Participation in a substance abuse program is voluntary, but it is important to note that you may not be hired into a CDL position by an employer until you have been evaluated by a SAP and completed the counseling or treatment program recommended by the SAP. It is your responsibility to make the initial contact and follow through on any SAP recommendations.

As an employee without status dismissed for cause, in accordance with KRS 18A.095, you may appeal this action to the Personnel Board within thirty (30) days after the effective date of the action. Such appeal must be filed in writing using the attached appeal form and in the manner prescribed on the form.

A copy of this notice is being furnished to the Secretary of the Personnel Cabinet, in accordance with Personnel Board Regulations.

Sincerely,



Tresa Straw
Appointing Authority

TS/knm

Attachments

cc: Personnel Cabinet
Personnel Board
Steve Waddle, State Highway Engineer
Kevin McClearn, Executive Director
Karen Cunningham, Administrative Coordinator
Agency Personnel File